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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 59

CARL ALDO MARZANI, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The main opinion of the Court of Appeals on the original hearing (R. 272-281) and the opinion on petition for rehearing (R. 292-293) are reported at 168 F. 2d 133. The opinion of the district court on motion to dismiss the indictment (R. 20-30) is reported at 71 F. Supp. 615.

### JURISDICTION

The judgment of the Court of Appeals was entered February 2, 1948 (R. 282), and a petition for rehearing (R. 283-290) was denied April 22,

1948 (R. 294). The petition for a writ of certiorari was filed May 22, 1948, and the writ was granted June 21, 1948 (R. 295). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [now 28 U.S.C. 1254]. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the offense of willfully making a false statement to a department of the United States concerning a matter within its jurisdiction involves "defrauding" the United States within the meaning of 18 U.S.C. [1946 ed.] 590(a), which suspends the running of the statute of limitations applicable to any offense involving the defrauding of any agency of the United States.

2. Whether the application of Section 35A of the Criminal Code, which interdicts the willful making of a false or fraudulent statement in any matter within the jurisdiction of a department of the United States, to the making of willfully false oral statements to a responsible official of the State Department, who was charged with determining whether petitioner was a security risk and should be permitted to hold office in that department, violates petitioner's rights under the Fifth and Sixth Amendments.

3. Whether petitioner was prejudiced by the alleged error of the trial judge in not excluding the

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first nine counts of the indictment on the ground that they were barred by the statute of limitations.

4. Whether the trial judge excluded otherwise admissible evidence because of its possible prejudicial effect on the jury, the jury having among its members nine Negroes.

STATUTES INVOLVED

Section 35A of the Criminal Code (18 U.S.C. [1946 ed.] 80)[1] provided:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; *or whoever shall knowingly and willfully falsify or* conceal or cover up by any trick, scheme, or device a material fact, *or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition,

[1] The references in the brief, unless otherwise indicated, are to the statutory provisions as they existed at the time of the offenses in question. Section 35A is now found in Sections 287 and 1001 of Title 18, U.S.C., as codified by the Act of June 25, 1948 (Public 772, 80th Congress).

> knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. [Italics added.]

The Act of August 24, 1942, 56 Stat. 747, as amended by Section 19(b) of the Contract Settlement Act of 1944, 58 Stat. 667, and Section 28 of the Surplus Property Act, 58 Stat. 781 (18 U.S.C. [1946 ed.] 590a),[2] provided:

> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three

[2] This provision is now 18 U.S.C. 3287.

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years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

STATEMENT

On January 17, 1947, petitioner was indicted in the District Court of the United States for the District of Columbia in eleven counts for having made false and fraudulent statements to representatives of government agencies in the course of an investigation as to his character and fitness for federal employment, in violation of Section 35A of the Criminal Code (18 U.S.C. [1946 ed.] 80) (R. 2-19). After a jury trial, he was convicted on all counts (R. 45-46) and sentenced generally to imprisonment for a period of from one to three years (R. 47). Upon appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed as to counts 10 and 11 and reversed as to the first nine counts on the ground that they were barred by the statute of limitations (R. 282, 294).

The evidence in support of the judgment may be summarized as follows:

*The making of the statements.* On March 7, 1942, petitioner was given an indefinite appoint-

ment to the position of Junior Economic Editor in the Office of the Coordinator of Information, subject to a character and fitness investigation (Gov. Ex. 8). On July 29, 1942, in the course of the investigation, petitioner, while under oath, was interrogated by an agent of the Federal Bureau of Investigation. The stenographic transcript of the proceedings (R. 244-246) discloses that petitioner denied that he ever had been a member of the Communist Party (count 1); that he ever had attended meetings of the Communist Party (count 2); that he ever had contributed services to the Communist Party (count 3); and that he ever had participated in any of the activities of the Communist Party (count 4).

On November 23, 1942, in the further course of the investigation, petitioner, while under oath, was interrogated by an agent of the Civil Service Commission. The stenographic transcript of this proceeding (R. 246-249) shows that petitioner denied that he had ever used the name "Tony Whales" (count 5); that he had ever been a member of the Communist Party (count 6); and that he had ever made any speeches against conscription (count 7).

Petitioner was rated ineligible for federal employment and on February 10, 1943, he took an appeal to the Civil Service Commission's Board of Appeals and Review. A hearing was had on April 20, 1943, and petitioner, testifying under oath, stated, *inter alia,* that he had never used the name

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or had been known as Tony Whales (count 8), and that he never had made any speeches against conscription (count 9) (R. 249-250). The Board of Appeals and Review reversed the earlier determination and rated petitioner as eligible for federal employment (Gov. Ex. 32; Tr. 334-335).[3]

Petitioner remained in federal employment until August or September 1943, when he was inducted into the Army (R. 173). The Army assigned him to his former work, which was then in the Office of Strategic Services (R. 173-174). In September 1945, petitioner was discharged from the Army and he resumed his civilian position, which was then in the State Department as a result of a transfer of functions from the Office of Strategic Services (R. 175). He was Deputy Chief of the Presentation Division and was engaged in the preparation "of reports for high officials in the State Department in a form which was quicker and more concise and clearer, and so on" (R. 175).

The State Department had established a Security Division for the purpose of screening employees absorbed from other agencies. The situation in respect of petitioner was brought to the attention of the Deputy Assistant Secretary for Administration, Mr. Panuch, and on April 30, 1946, he directed a subordinate to request petitioner's resig-

[3] The evidence which later became available and constituted the bulk of the Government's case in the trial court was not then available and, of course, was not considered by the agencies of the Civil Service Commission (see R. 68).

nation from the State Department (R. 47-48). On June 1, 1946, after he had been requested to resign, petitioner obtained an interview with Mr. Panuch for the purpose of discussing the security matter in which he was involved (R. 48). Panuch told (R. 49) petitioner that the charges against him were—

> that you were a Communist, a member of the Communist Party in 1940 and 1941, and that you were a Communist organizer; that you operated in front organizations in New York. * * * That you operated under the alias of Tony Whales; that your wife was a member of the Communist Party and that her Communist Party name was Edith Charles; that you opposed conscription; that you made a false statement with respect to your financial resources to get a job with W.P.A., and that statement was made under oath; and that you signed a petition as a member of the Communist Party for the * * * election of Earl Browder as Congressman.

Petitioner specifically denied each charge (R. 49-50). His denial that he ever had been a member of the Communist Party (R. 50) is the basis for count 10 of the indictment, while count 11 is founded on his denial that he ever had used the name or had been known as Tony Whales (R. 50). Panuch testified (R. 52) that the conference lasted over two hours and "was in the nature of an appeal" from his subordinate's request of petitioner

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that he submit his resignation. According to Panuch, "the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly" (R. 52).

Thereafter, a further investigation of petitioner's activities was conducted and this disclosed convincing proof of the charges made against petitioner, for information was obtained from New York City Detective Drew (see *infra*, pp. 9-17) concerning Drew's undercover activities in the Communist Party and other groups, at a time when petitioner also was active in those various organizations (R. 54). In November 1946, petitioner sought to resign from the State Department (R. 54-55), but that agency discharged him in the interest of the United States (Gov. Ex. 35, Tr. 286, 360).

*The falsity of the statements.* To establish the falsity of the statements in question the Government relied principally upon the testimony of New York City Detective Drew who, in the performance of his duties, had infiltrated into the Communist Party and other groups dominated by it, and on the testimony of two former members of the Communist Party.

Drew testified that in the performance of his assigned police duties, he joined the Communist Party on July 22, 1940, using the name "William Easley," and that petitioner was present in the

office when he joined (R. 92-93). Drew paid his fees and was issued a Communist Party membership book (R. 93). That evening Drew attended a meeting presided over by petitioner's wife (R. 93, 94), a member of the Communist Party (R. 231). Petitioner was among those present, and was introduced to Drew as Tony, a national committeeman (R. 94).[4] The presiding official at the meeting, petitioner's wife, stated, *inter alia,* that the country was on the verge of an imperialist war; that the time was ripe to bring to the people the need for peace and the Communist Party; and that the comrades should all support Congressman Marcantonio in all his endeavors (R. 94). Detective Drew further testified to the following events, occurring respectively on the dates noted:[5]

July 23, 1940: Drew attended a class for recruits in the Communist Party at local headquarters for the organization. Petitioner conducted the class and instructed those present on the subjects of race discrimination, white chauvinism, and the principles of communism (R. 96-97).

July 29, 1940: Drew reported to petitioner, his organizer, at local Communist Party headquarters concerning his activities on a petition campaign. Petitioner told Drew that he was pleased and that

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[4] Approximately one month later Drew learned that petitioner's name was Tony Whales (R. 94).

[5] In the course of his testimony, Drew, for the purpose of refreshing his recollection, frequently referred to contemporaneous reports which he made to his superiors in the Police Department (R. 97).

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"he could see that I had the makings of a good comrade" (R. 97).

August 6, 1940: After attending a recruit class at the Section Headquarters of the Communist Party, Drew, petitioner and others assembled in the main room where one Appel, a section organizer,[4] informed them of a mass demonstration to be held that night at Times Square, and instructed them to leave all identification possessed on their persons at the Communist Party headquarters in order that "if the police did pick us up we would not have anything to identify us as being Communists" (R. 98).

August 9, 1940: Drew attended a meeting of Branch F-2 of the Communist Party, at which petitioner delivered a speech against conscription (R. 98-99).

August 12, 1940: Petitioner requested Drew to turn in his Communist Party membership book. Petitioner told Drew that "I want your card in order that the name may be changed, so as to protect you on your job against anything that may happen by the Government if they happen to out-

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[4] The Communist Party in New York City was divided into sections, located in the various assembly districts. At the head of a section is a section organizer, who has an executive secretary, executive educational director and executive daily worker manager. Each section also has an executive committee. A section is composed of many groups. The offices in the subdivisions are comparable to the offices in the section. Petitioner was a branch organizer—a leader of a branch—and a member of the section executive committee. He also held office as a section educational director (R. 101-102).

law the Communist Party and they would find out that you are a member, it would throw you out of your job." Drew surrendered his card to petitioner and the two then attended a Communist Party meeting (R. 99).

September 3, 1940: Drew attended a regular Branch meeting, at which petitioner presided. After the meeting had commenced, Appel, a section organizer, came in and took the floor. He told the members present that it was "control week" and that "all the membership books, papers and records in the Communist Party were going to be burned * * * so that there would be no record left to reveal his [the member's] identity or any of the records pertaining to the Party." Petitioner then resumed control of the meeting and called for a delegation to go to Congressman Ellenstein's home to protest the then pending draft legislation, it being understood that the protestors would do this as "citizens" and not "Communist members" (R. 100-101).

September 5, 1940: Drew attended an open air meeting presided over by petitioner. Petitioner opened the meeting by stating that the meeting was called by the Communist Party of the Sixth Assembly District. The meeting was concerned with steps to defeat the pending draft legislation. One of the speakers was petitioner's wife, who was introduced by petitioner as "Comrade Edith" (R. 102-103).

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September 16, 1940: Drew attended a regular Branch meeting of the Communist Party. In the course of the meeting petitioner came in and announced that he wanted to discuss with the Branch the question of expelling two comrades. Petitioner said that these two "were not participating as Communists, they did not canvass, they were afraid to circulate as Communists, and he felt they should be expelled" (R. 103-104).

October 14, 1940: Drew attended a regular Branch meeting of the Communist Party. This was after the enactment of the Selective Training and Service Act. During the meeting petitioner came in and asked to speak, stating that "now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights, and teaching them Communism. In this way we could soon overthrow the Capitalists and also take over control of the Army. We were to work on the officers as well as the men, and this job was especially assigned to young men of conscription age" (R. 104-105).

October 17, 1940: At petitioner's request, Drew joined him at local Party headquarters for the purpose of folding literature and cleaning the office. They each discussed their reasons for joining the Communist Party and in the course of the con-

versation petitioner said that he had also caused his wife to join the Party (R. 105-106).

November 20, 1940: Drew and Appel, the section organizer, were working at local Party headquarters burning records and literature when petitioner came in. Drew told petitioner that he and several other Negroes that had been Party members were organizing the National Negro Congress, and petitioner expressed satisfaction with the work that Drew was doing (R. 106-107).

November 25, 1940: Drew attended the regular Branch meeting of the Party, at which petitioner was present (R. 107).

December 2, 1940: Drew attended a regular Branch meeting of the Communist Party. At the meeting, petitioner advocated an increase in their activities in recruiting new members and announced "a general functionary's meeting to be held for the purpose of receiving the report" on the recent Communist Party convention (R. 107-108).

December 9, 1940: Drew attended a regular Branch meeting, at which petitioner exhorted those present to sell more copies of the Daily Worker and the Sunday Worker and to stir up opposition to the Smith-Connally Bill, which was then pending in Congress, on the ground that the bill would outlaw strikes and thus was against the principles of the Communists (R. 109-110).

December 16, 1940: Drew attended a regular

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Branch meeting, at which petitioner presided. Those present were instructed on how to prepare leaflets and to duplicate them (R. 111).

January 31, 1941: Petitioner and Drew were present at a social affair of the National Negro Congress. Drew introduced petitioner to those present as Tony Whales, a member of the Communist Party (R. 111).

February 11, 1941: At a meeting at local Party headquarters, petitioner introduced Drew to one Daniels, a new section organizer. Drew discussed his work with the National Negro Congress, and petitioner counselled him in steps to be taken in the future, assuring Drew that the Communist Party "would be back of us and would give us all their assistance" (R. 111-112).

February 22, 1941: Drew met with members of the Communist Party Section Executive Committee composed of petitioner and three others. Drew discussed the National Negro Congress. Petitioner, as Section Educational Director of the Communist Party, was assigned to assist Drew in preparing literature for the National Negro Congress, and it was agreed at the meeting that the Communist Party's office and machines were to be used for this purpose. Following the meeting petitioner and Drew prepared a leaflet "about discrimination" (R. 113).

February 28, 1941: Drew went to petitioner's home to obtain certain leaflets and observed a Com-

munist Party meeting taking place at the time (R. 114).

March 18, 1941: Drew attended a meeting of the National Negro Congress at which petitioner, one Louis Harper (see, *infra,* pp. 17-18) and Drew spoke. Petitioner was introduced to the gathering as Tony Whales (R. 114-115).

April 3, 1941: Drew called and attended a meeting of all Communist Party members in the National Negro Congress and "progressives from other organizations." Petitioner told those present that he could not remain at the meeting, but announced that Louis Harper (see *infra,* pp. 17-18) was going to conduct a class for the Communist Party, with Negroes from the National Negro Congress and other organizations, and that he "wanted all the colored comrades to attend this class." Petitioner also stated that those present needed studying and education along "the party line" (R. 115-116).

April 4, 1941: Drew attended a meeting sponsored by the National Negro Congress. Petitioner delivered a political discussion, speaking about how many Communists were in this country at that time and stating that "we outnumbered the number of Communists in Russia during 1917 when the revolution took place"; that "now was the time for revolution"; and that "the Communists could have a revolution in this country." He also urged those in attendance to attend the class being con-

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ducted by Harper and to attend the Workers' School, for the betterment of their organization (R. 116).

May 28, 1941: A meeting was held at petitioner's home, at which members of the National Negro Congress met with the Section Executive Committee of the Communist Party. Petitioner, Drew and Harper were among those present. The meeting was concerned with the downfall of the National Negro Congress on the East Side and with plans for rebuilding the organization "without the visible aid of the Communist Party" (R. 116-117).

September 3, 1941: Drew talked with petitioner at Communist Party headquarters (R. 121).

September 22, 1941: Drew visited the home of one Mary Farnum for the purpose of attending a Communist Party Executive Committee meeting, which was cancelled. While he was there, petitioner brought leaflets to Farnum, stating that it was her responsibility to see that the comrades distributed them (R. 121-122).

Louis Harper, another government witness, gave testimony that substantiated important aspects of Drew's testimony. Harper was a regular member of the Communist Party from 1932 to 1938 and attended some meetings thereafter (R. 71, 73, 78). He met petitioner in 1940 and knew him as Tony Whales (R. 72). Later Harper came to know petitioner as Carl Marzani, as a result of their membership in two other organizations (R.

72). He attended a meeting of the Communist Party at which petitioner and "Bill Easley" were present [7] (R. 73). Harper testified concerning activities on his part and on the part of Drew and petitioner in behalf of the National Negro Congress (R. 74-79), and that petitioner participated in those activities as a representative of the Communist Party (R. 77-78).

Another government witness, George Hewitt, was a member of the Communist Party from 1927 to 1944 (R. 255). In 1930 he went to Russia and remained there for about two years, during which time he attended the International Lenin School. The purpose of the schooling was "learning espionage"; learning how to become "professional revolutionists"; and learning "theory that would ultimately lead to the overthrow of the United States Government" (R. 255). In 1940 Hewitt was a teacher in the Communist Party's Workers School (R. 256). He used the name "Tim Holmes" to conceal his identity (R. 256). Detective Drew, using the pseudonym of "Bill Easley," was a student in the school (R. 256). Through Drew, Hewitt met petitioner in 1940 and knew him as Tony Whales (R. 257), the Educational Director of a section of the Communist Party (R. 257-258). Hewitt met petitioner a second time at the State Headquarters of the Communist Party in New

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[7] Harper did not know until the time of the trial that "Bill Easley" was in fact Detective Drew (R. 73).

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York City, at an educational organizer's meeting (R. 260-261).

In the course of his testimony for the defense, petitioner admitted knowing Harper (R. 185), but denied ever having known Hewitt or Detective Drew (R. 193). On cross-examination, he admitted that he signed and was active in securing signatures on a petition for the nomination of Earl Browder on the Communist Party ticket, as a candidate for representative in Congress, at an election that was held on February 6, 1940 (R. 218-221; see also R. 222-228).

## SUMMARY OF ARGUMENT

### I

The court below erroneously held that the first nine counts, relating to offenses committed more than three years before the indictment was filed, were barred by the statute of limitations. Congress suspended the running of the statute of limitations for any offense against the laws of the United States "involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner." Act of August 24, 1942, as amended (18 U.S.C. [1946 ed.] 590a). The offenses here involved the defrauding of the United States because they involved the wilful making of false and fraudulent statements to the United States. This was an interference by deception with the lawful functioning of a department of the United States and was a

fraud on the United States within the concept of fraud recognized in *Haas* v. *Henkel*, 216 U.S. 462, 479-480; *Hammerschmidt* v. *United States*, 265 U.S. 182, 188; and *United States* v. *Gilliland*, 312 U.S. 86. The Second Circuit has so held in a comparable case. *United States* v. *Gottfried*, 165 F. 2d 360, 367-368, certiorari denied, 333 U.S. 860.

The view of the court below that the statute suspending the running of the period of limitations reaches only that fraud which causes financial or property loss to the Government finds no support in the cases of *Noveck* (271 U.S. 201), *McElvain* (272 U.S. 633), and *Scharton* (285 U.S. 518). In none of those cases did this Court hold that financial loss is a necessary element of fraud in the sense in which it was used in the statute. The Court held only that it must be shown that fraud is a specific ingredient of the offense. It is such an ingredient here. For, as the trial judge charged the jury (R. 41), the statute punishes falsity only where there is "a deliberately-planned purpose and intent to deceive and thereby gain an unlawful advantage."

The legislative history of the Suspension Act refutes the concept that Congress suspended the running of the period of limitations for fraud involving money or property, but not for fraud involving interference by deception with the lawful functioning of a department of the Government. The legislative materials show that Congress was

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intent on reaching all fraud and, more specifically, that Congress had Section 35A of the Criminal Code in mind when it used the language of the Suspension Act now in question.

## II

Assuming, *arguendo,* that only counts 10 and 11 are valid, there was no prejudicial error in the reception of evidence. The evidence in support of the first nine counts showing that petitioner had been an active member of the Communist Party and had used the name "Tony Whales" was relevant to show the falsity of petitioner's statements, involved in counts 10 and 11, that he had never been a member of the Communist Party and had never been known as "Tony Whales." The evidence as to the making of the nine statements involved in the first nine counts was admissible to show, as the jury was required to find, that petitioner had a deliberately-planned purpose to deceive and thereby to gain an unlawful advantage. Evidence of the making of the earlier statements convincingly demonstrated petitioner's plan and negatived the possibility that the two statements involved in counts 10 and 11 were innocently made as the result of misapprehension; it proved that the statements were wilfully false and fraudulent. The fact that some of the evidence might have disclosed the commission of other crimes does not detract from its admissibility if it was otherwise

competent. *Moore* v. *United States,* 150 U.S. 57, 61.

Petitioner's contention that the general sentence is invalid because it was based on the assumption by the trial judge that all eleven counts were valid is foreclosed by the decision in *Pinkerton* v. *United States,* 328 U.S. 640, 641-642. There, this Court held, following a long and well-settled line of cases, that a general sentence, which was within the maximum allowable on any one count, was valid if it was supported by any good count. In this case the sentence of imprisonment for a term of from one to three years was well within the permissible maximum of ten years' imprisonment, and can thus be supported by any valid count.

## III

There is no merit to petitioner's claim that he could not know from the words of Section 35A of the Criminal Code that his willfully false and fraudulent statements were punishable because the statutory words "in any matter within the jurisdiction of any department or agency of the United States" are too vague and indefinite. This Court recently read the words as meaning in any matter within the authorized functions of the department. *United States* v. *Gilliland,* 312 U.S. 86, 93. This is the natural import of the words in their setting. Petitioner could not conceivably have failed to know that the question of accepting

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his resignation from office in the Department of State was a matter within that Department's authorized functions. Indeed, his request for a conference with the official responsible for security matters in order to persuade him to withdraw the request for his resignation demonstrates that petitioner well knew what he now claims he could not know. A deliberate plan to deceive in order to obtain an unlawful advantage, which the jury found, is incompatible with the present claim of surprised innocence.

IV

The contention that the trial judge denied petitioner a fair trial because he excluded competent evidence solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence objectively must fail for lack of support in the record. The record clearly demonstrates that the trial judge never announced any such criterion for testing the admissibility of evidence; that petitioner never objected to any ruling on the ground that such a test was being applied; and that, as the court below found, the rulings of the trial judge were correct.

ARGUMENT

Of the three contentions argued by petitioner in the petition for a writ of certiorari, the first two stem from the circumstance that the court below determined that the statute suspending the running

of the statute of limitations for offenses involving the defrauding of the United States or any of its agencies does not apply to the offenses involved in this case, and that the first nine counts of the indictment—involving false and fraudulent statements during the period from July 29, 1942 to April 20, 1943[8]—were therefore barred by the normal three year period of limitations.[9] For the reasons set forth below under Point I, we think it clear that the court below erred in its construction of the suspension statute. If the Court agrees with our position on this question, there is no necessity for any decision on the constitutional question and the question of error in the admission of evidence which petitioner urges. Accordingly, we turn first to the question of the statute of limitations, and then, assuming *arguendo* that our position on that question is not accepted by the Court, we answer the constitutional contention and the question of allegedly prejudicial error, as well as the other matters urged by petitioner.

## I

**False and fraudulent statements willfully made to a government agency in a matter within its jurisdiction constitute offenses involving the "defrauding" of the United States, and the running of the statute of limitations was suspended as to those offenses.**

A. *The Government has standing to urge the question in this Court.*—Inasmuch as petitioner

[8] The indictment was returned January 17, 1947 (see R. 273).

[9] See 18 U.S.C. [1946 ed] 582.

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was sentenced generally on the eleven counts on which he was convicted (R. 47), the Court of Appeals affirmed the judgment of conviction, notwithstanding that it determined that nine of the counts had been barred by the statute of limitations. We disagreed with the opinion below on the limitations issue,[10] but since the judgment itself was affirmed *in toto*, there was no occasion to seek review by this Court of the limitations problem. The case now is before the Court on petitioner's contentions that the judgment of conviction should be reversed. The Government, on the other hand, seeks to support the judgment. Since the United States is not seeking to enlarge its rights under the judgment, it is entitled to assert the limitations question as an independent basis for supporting that judgment. *United States* v. *Ballard*, 322 U.S. 78, 88; *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425, 435-436; *Stelos Co.* v. *Hosiery Corp.*, 295 U.S. 237, 238-239; *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 548.

B. *The decision of the Court of Appeals on this issue is inconsistent with the plain language of the statutes involved and is not compatible with the congressional purpose evidenced by the legislative materials.*—1. Each count of the indictment rests on that clause of Section 35A of the Criminal Code which interdicted the wilful making of "any false

[10] See the expression of our views in our brief in opposition in *Gottfried* v. *United States*, No. 561, Oct. T. 1947, pp. 25-35; and see, too, pp. 18-19 of our brief in opposition in this case.

or fraudulent statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * *." This Court had occasion to consider fully the scope of the provision in *United States* v. *Gilliland*, 312 U.S. 86, 91-95. The statutory provision is intended, as the Court there noted (312 U.S. at 93), "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." And it reaches false and fraudulent statements made under such circumstances even though they do not cause the Government pecuniary or property loss (312 U.S. at 93). Consistently with this construction of Section 35A, each count of the indictment alleges with appropriate specificity that petitioner wilfully made "a false and fraudulent statement and representation" in a matter within the jurisdiction of the agency to which it was made.

It is necessary to consider, together with the pertinent terms of Section 35A, the terms of the Act of August 24, 1942, as amended (*supra*, pp. 4-5), to which we shall refer as the Suspension Act. That Act suspends the running of the statutes of limitation for three categories of offenses, only the first of which is pertinent here, as follows:

> The running of any existing statute of limitations applicable to any offense against the

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> laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. * * *.[11]

It is plain from even a casual reading of both statutes that the critical words are almost identical. The Suspension Act refers to offenses involving "defrauding" the United States "whether by conspiracy or not" and "in any manner." The quoted phrases emphasize the breadth which Congress gave to the provision. By its terms the statute reaches offenses involving any manner of fraud on the Government.

And Section 35A describes such an offense. The

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[11] The termination of hostilities was proclaimed by the President on December 31, 1946 (12 Fed. Reg. 1), and the suspension period thus will end December 31, 1949.

pertinent clause strikes at the willful making of "false or fraudulent" statements and representations to an agency or department of the United States, and the indictment charges that petitioner's statements were willfully false and fraudulent. Certainly the making of false and fraudulent statements to a Department of the United States in a matter within its jurisdiction, which causes that Department to act otherwise than it would have acted if the statements had not been made, is a fraud on that Department (see *infra*, pp. 29, 41-42).[12] Such fraud is a violation of Section 35A, and it is equally the kind of offense to which the plain, broad language of the Suspension Act extends.

In his brief in the court below petitioner did not deny that the offense involved here is one of fraud on the Government in the lawful functioning of one of its departments, but he urged, in effect, that this is a broader concept of fraud than the Suspension Act contemplates.[13] It was his position that only the narrower concept of fraud, in the sense of causing property or pecuniary loss to the Government, was intended to be reached by the Suspension Act.

The difficulty with this position is that it squares neither with the words of the statute nor with the policy of Congress. Congress did not refer to de-

[12] See *Knauer* v. *United States*, 328 U.S. 654, 657: "Fraud connotes perjury, falsification, concealment, misrepresentation."

[13] See Brief for Appellant, pp. 18-20, 26-33, 37-38.

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frauding the Government of money or property. Nor did Congress refer merely to fraud, without indicating the breadth of meaning it intended that word to have. Instead, Congress used the broadest language imaginable and referred to defrauding the United States "in any manner" either by conspiracy or otherwise. It cannot be denied that the willful making of false and fraudulent statements to a department of the Government is a manner of fraud. The decision in *United States* v. *Gilliland,* 312 U.S. 86, demonstrates this. If any heed is to be given to the plain meaning of plain words, it would be difficult, if not indeed impossible, to conclude that "defrauding" "in any manner" means only that species of fraud which results in a pecuniary loss.

Apart from the plain words of the statute, we have great difficulty in believing that a Congress which was alert at the beginning of hostilities to protect the Government from fraud which might escape detection in the hurly-burly of war was concerned only with financial loss. Experienced legislators obviously were aware that the kind of fraud which interferes with the lawful functioning of a department of the Government very often carries consequences infinitely more serious than those involved in mere financial loss. It is not reasonable to assume that Congress was concerned only with money. There is no reason of policy why Congress would have intended to preserve the

Government's opportunity to prosecute for financial frauds, and not for other frauds. The necessity for additional time to investigate and prosecute is the same in either situation, and the evil certainly is no greater in the case of financial fraud than it is in the case of deceptive interference with the proper functioning of the agencies and departments of the Government. Only by disregarding some of the words of the statute and by attributing to Congress a lack of good judgment is it possible to narrow the Suspension Act in the manner contended for by petitioner.

The view which we urge is the position which Judge Learned Hand, speaking for the Second Circuit, recently adopted in a case involving a prosecution for making a false and fraudulent statement to a War Price and Rationing Board, in violation of Section 35A. *United States* v. *Gottfried,* 165 F. 2d 360, 367-368, certiorari denied, 333 U.S. 860, rehearing denied, 333 U.S. 883. See also *United States* v. *Agnew,* 6 F.R.D. 566 (E.D. Pa.). It is the view which gives the words of Congress their fair meaning, and gives Congress credit for having an interest in more than simply the dollars and cents of the daily treasury balance.

2. The legislative materials relating to the Suspension Act emphasize, we submit, the correctness of our view of the statute, and demonstrate that Congress had Section 35A specifically in mind when it legislated on this question. The statute

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was initially enacted as the Act of August 24, 1942, and provided—

> * * * That the running of any existing statute of limitations applicable to offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, shall be suspended until June 30, 1945, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. * * *

Its purpose was to suspend for the period of the war the running of the statutes of limitation applicable to offenses involving the defrauding of the Government.[14] As the Committee Reports state, experience during the first World War showed that many offenses involving fraud on the Government were barred because they had not been discovered within time to prosecute during the three year period of limitations.[15] In the words of both Committee Reports—

> During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute

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[14] H. Rep. No. 2051 and S. Rep. No. 1544, 77th Cong., 2d sess.

[15] In 1921 a proviso was added to the three year statute of limitations extending the period for six years for offenses involving fraud on the Government. Act of November 17, 1921, 42 Stat. 220. The extension was repealed in 1927. Act of December 27, 1927, 45 Stat. 51. See *infra*, pp. 38-40.

frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under stress of present-day events, for the protection of those who would defraud or attempt to defraud the United States.

It is of course a fair inference from the legislative materials that one of the motives of Congress in suspending the running of the statutes of limitations for fraud offenses was to strike at frauds stemming from the Government's huge military procurement program. But nothing suggests that

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Congress intended to or did limit the statute to such frauds. Instead Congress used sweeping words to reach all frauds, and subsequent legislative developments in connection with the statute demonstrate persuasively that broader intention.

The Act was first amended by the Contract Settlement Act of 1944, which provided in Section 19, the enforcement provision, as follows:

> (b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U.S.C., Supp. II, sec. 590a), is amended to read as follows:
>
> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the

existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

* * * * *

(d) The provisions of section 35-A of the Criminal Code (18 U.S.C., sec. 80) [16] shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition made or used or caused to be made or used for any purpose under this Act or under any regulations pursuant to this Act.

* * * * *

House Report No. 1590, 78th Cong., 2d Sess., p. 28, explained these provisions as follows:

Subsection (b) amends the act of August 24, 1942 (56 Stat. 747). This amendment suspends until 3 years after the termination of hostilities the running of any existing statute of limitations applicable to any Federal offense involving fraud, against the United States or connected with the negotiation, procurement, award, performance, payment for interim financing, cancelation or other termination, or settlement of any war contract.

* * * * *

Subsection (d) deals with the criminal penalties for fraud. It makes clear that the provisions of section 35-A of the Criminal Code (18 U.S.C., sec. 80) also apply to any such

[16] The statute upon which the instant prosecution is founded.

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> statement, representation, or other document made or used or caused to be made or used for any purpose under the act. Section 35-A imposes criminal penalties up to $10,000 in fines and up to 10 years' imprisonment for fraudulent actions involving the Government.

Senate Report No. 836, 78th Cong., 2d sess., p. 5, similarly emphasizes the fact that the penalty provided by Section 35A is an important enforcement sanction.

The suspension of limitations provision was further broadened in the Surplus Property Act of 1944, 58 Stat. 781, to include any offense committed in connection with the care and handling and disposal of property under that Act. Senate Report No. 1057, 78th Cong., 2d sess., p. 14, points out that the enforcement provisions of the Act are in addition to "any other civil remedies which the United States may have and of such provisions of the Criminal Code as relate to *fraud* (18 U.S.C. sec. 80) [17] and conspiracy (18 U.S.C. sec. 83)." [Italics added.]

Two significant points are reflected by these legislative materials. First, the addition of clauses "(2)" and "(3)" to the Suspension Act relating specifically to offenses in connection with the procurement and disposition of war materials demonstrates that clause "(1)" was intended by Congress to include fraud offenses which were not war

[17] Section 35A of the Criminal Code, the provision involved in this case.

frauds, i.e., frauds in the procurement and disposition of war material. Otherwise it would have little, if any content. It is, we submit, the catch-all clause, which covers such fraud offenses as are not dealt with specifically in the latter two clauses.

The second important point is that Congress demonstrated its understanding of Section 35A as a fraud statute by specifically referring to it as such in the enforcement provisions of the Contract Settlement Act. The specific reference to Section 35A in Section 19(d) of the Contract Settlement Act plainly demonstrates that Congress intended this important substantive provision to have the benefit of the suspension of the period of limitations provision in Section 19(b). But if there were in the language of the statute any room for doubt, that doubt is entirely dispelled by the specific reference in the House Report, first to Section 19(b) as suspending the period of limitations for offenses involving "fraud," and second by the reference to Section 35A as providing criminal penalties for "fraud," and "for fraudulent actions involving the Government." It is not often that Congress specifically makes its intent so plain. The references on the floor of the House by sponsors of the legislation to the fact that Section 35A provides a criminal enforcement sanction for the Act (90 Cong. Rec. 6060) and to the fact that criminal and civil penalties are provided for "any fraudulent practices" (90 Cong. Rec. 6053) serve only to em-

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phasize that the members of Congress were familiar with Section 35A, and that there would have been little, if any, purpose in providing for the suspension of the limitations period if the suspension provisions were not intended to apply to the most important criminal sanction in the Act. Similarly, the legislative materials with reference to the Surplus Property Act emphasize that the Congress which suspended the limitations period for offenses involving fraud on the United States specifically regarded Section 35A as a "fraud" statute.

It is significant likewise that nothing in the legislative history even intimates that, in referring to Section 35A, Congress had in mind anything short of the entire provision, or suggests in any manner that Congress was concerned only with particular clauses of that section. For each of the clauses of Section 35A complements its companions in striking at various means of perpetrating frauds on the Government. There is in consequence not the slightest reason to suppose that Congress was not intent on all of those clauses being available to protect the Government from fraud.

3. The opinion of the Court of Appeals on this question did not refer to the legislative history of the Suspension Act. Nor does it appear that the Court of Appeals attempted independently to ascertain the plain meaning of the words of the statute. Instead, the court predicated its decision on this question on three decisions of this Court in-

volving similar statutes after the first World War, which it regarded as dispositive of the issue, notwithstanding that none of the three cases involved a prosecution for making false and fraudulent statements to a Government agency in violation of Section 35A of the Criminal Code.

As we have shown, *supra*, p. 31, in 1921 a proviso was added to R.S. 1044, the general criminal statute of limitations, to make the provision read as follows:

> No person shall be prosecuted, * * * for any offense * * * unless the indictment is found * * * within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner * * * the period of limitation shall be six years.

The pertinent language of the foregoing proviso is identical with the language of the first clause of the present Suspension Act.

In *United States* v. *Noveck*, 271 U. S. 201, the defendant was indicted for perjury in making an income tax return, it being alleged that the perjury was committed for the purpose of defrauding the United States. Relying on the allegation of fraudulent purpose, the Government urged that the offense involved defrauding the United States and, therefore, that the six year period of limitations

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was applicable. This Court rejected the argument, pointing out that (271 U. S. at 203)—

> * * * the alleged purpose to defraud the United States is not an element of the crime defined in § 125 [perjury], on which the indictment is based. The allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage.

Adopting what it later characterized as a strict construction of the proviso (see *United States* v. *McElvain*, 272 U. S. 633, 639), this Court held that the six year period of limitations applied only to offenses "in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense." 271 U. S. at 203-204. Since the elements of the offense of perjury do not include fraud, the Court held that the prosecution was barred by the three-year period of limitations. Consistently with this view the Court subsequently held in *United States* v. *Scharton*, 285 U. S. 518,[18] a prosecution for attempting to evade taxes by falsely stating taxable income, that the longer period of limitations was not applicable because the specific offense charged did not include fraud as one of its ingredients. Similarly, *United States* v. *McElvain*, 272 U. S. 633, involved a conspiracy to defraud arising out of the making of a false tax return, and this Court held that none of the sub-

[18] The case involved a statute of limitations applicable to tax cases, which contained the same proviso as R.S. 1044.

stantive tax offenses for which the defendant could have been indicted were reached by the proviso extending the period of limitations, and that a conspiracy to commit any of these offenses likewise was not included either.

As an original proposition, there is much that could be said on the basis of the statutory language and congressional purpose against the narrow construction which the Court gave the 1921 proviso. We do not pause, however, to reargue the merits of these decisions of almost a quarter century ago, for even on the basis of the technical, rigid doctrine which the Court adopted, the offense of making a fraudulent statement to a department of the United States is still covered by the proviso.

The court below read the three decisions just discussed as holding, in effect, that the extended period of limitations applied only to offenses in which the Government suffered financial or property loss (see R. 275-276). We find no such limitation in any of those three decisions, and, so far as we have been able to ascertain, no other court has interpreted them in this manner. See e.g.,[19] *Bailey* v. *United States*, 13 F. 2d 325, 326 (C.C.A. 9); *Weinhandler* v. *United States*, 20 F. 2d 359, 360-361 (C.C.A. 2), certiorari denied, 275 U. S. 554; *Miller* v. *United*

[19] While some of the cited cases involved facts showing pecuniary loss to the Government, the significant feature of the cases is that none of the courts even referred to this as a relevant factor. The courts simply applied the rule of the *Noveck* case and determined whether fraud was an ingredient of the offense involved.

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*States,* 24 F. 2d 353, 360-361 (C.C.A. 2); *Falter* v. *United States,* 23 F. 2d 420, 425-426 (C.C.A. 2), certiorari denied, 277 U.S. 590; *In re Doyle,* 42 F. 2d 686, 691 (S.D.N.Y.), reversed without opinion, *sub nom. United States* v. *Doyle,* 47 F. 2d 1086 (C.C.A. 2). This Court determined only that, in order to construe the proviso as narrowly as possible, it would not be applied to any offense which did not specifically include fraud as one of its elements.

Here, however, the statute includes as an element of the offense the willful making of a fraudulent statement to the government in a matter within its jurisdiction, and the indictment charges that petitioner willfully made such fraudulent statements. Once it is recognized, as it must be, that the concept of fraud is not limited to pecuniary loss, there is no difficulty whatever in fitting the offense in question into the stringent requirement that the fraud must be "an ingredient under the statute defining the offense." *United States* v. *Noveck,* 271 U. S. at 204. For many years this Court has made it plain that a conspiracy to defraud the Government includes not only causing it pecuniary loss, but also includes interfering by deception or trickery with the lawful functioning of any department of the Government. *Haas* v. *Henkel,* 216 U. S. 462, 479-480, and cases cited; *Hammerschmidt* v. *United States,* 265 U. S. 182, 188; *United States* v. *Gilliland,* 312 U. S. 86, 92; *United States* v. *Bayer,* 331 U. S. 532,

533. The making of a false and fraudulent statement to a department of the Government upon which it acts is such an interference with the lawful functioning of that department. See *United States* v. *Gilliland*, 312 U. S. 86, 93.

It is not without significance in considering what Congress intended by its language in the present Suspension Act to recall that Congress did not stop to express disagreement with the narrow construction which this Court gave the predecessor statute. As this Court noted in *Braverman* v. *United States*, 317 U. S. 49, 54-55, Congress wrote specific provisions into the Revenue Act of 1932 for the express purpose of overcoming those decisions. It is less than reasonable to believe that in 1942 Congress wrote into legislation a construction which was so narrow that earlier legislation had already been enacted to overcome it. Yet the court below not only disposed of the present issue solely on the basis of this Court's earlier decisions and without discussion of the significant legislative materials, but also it did so on the basis of the narrowest possible reading of opinions which admittedly narrowly construed the statute in question.

4. In recommending passage of the Suspension Act in 1942, the House and Senate Committees laid great emphasis on the fact the war program made it likely that frauds on the Government could not be detected within the normal three-year period of limitations and that it was imperative that the

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Department of Justice be allowed ample time to uncover and prosecute such offenders (see *supra*, pp. 31-32). This is such a case. For three years petitioner flatly denied to various agencies of the Government that he had been a member of the Communist Party. And so he managed to remain on the State Department rolls in an important position. It was not until near the close of the shooting war that the New York Police Department was willing to open its security files, and it was still later until Detective Drew's evidence, which so convincingly demonstrates the falsity of petitioner's statements (see *supra*, pp. 9-17), became known to the Government and became available for use in a judicial proceeding (See R. 53, 67-68). But for the war, the evidence undoubtedly would have been known and available for use long before. It is precisely this kind of situation which led Congress to suspend the running of the statute of limitations for fraud on the United States. The will of Congress ought not to be disregarded by a grudgingly narrow construction of words which were used in their broadest sense to protect the Government.

## II

**Assuming *arguendo* that only counts 10 and 11 are valid, there was no prejudicial error in the reception of evidence, in the charge to the jury or in the sentence.**

Having succeeded on appeal in obtaining the reversal of his conviction on the first nine counts on

the ground that they were barred by the statute of limitations, petitioner now urges that his conviction on the remaining two counts should also be set aside because evidence on the other counts was received at his trial and those other counts were submitted to the jury. If our position in Point I of the Argument is sound, there is, of course, no occasion to reach this contention. Assuming *arguendo*, however, that the Court should reject our argument on the statute of limitations, we shall show that the evidence involved under the first nine counts was properly admissible under counts 10 and 11, and that petitioner was not substantially prejudiced in any manner by the asserted error of the trial judge in overruling the plea in bar and thus permitting the first nine counts to be submitted to the jury.

A. *The submission of the allegations of the first nine counts to the jury did not prejudice petitioner.* —Petitioner's first ground for asserting prejudice in respect of the first nine counts is the contention that "The first nine counts contain specific allegations of prejudicial matter which are entirely lacking in the remaining two counts", and that if the trial count had dismissed the first nine counts, "none of these charges would have been included in the indictment or submitted to the jury" (Pet. 23, 24; see Br. 42-51). It is true, of course, that if the trial judge had sustained the plea in bar as to the first nine counts, the allegations would not have been submitted to the jury, but it does not at all follow

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that the fact that the jury had the complete indictment in any manner prejudiced petitioner. Consistently with the elementary premise that an indictment is a pleading and nothing more, the trial judge instructed the jury (R. 34) that—

> The fact that a defendant has been indicted and is charged with a crime is not in itself to be taken as an indication of guilt, and no inference is to be drawn against him from that fact, because an indictment is merely the machinery and the procedure that the law provides for bringing a defendant before the Court and placing him on trial. That is the only function of an indictment.

Petitioner accepted this instruction as a correct and adequate statement of the applicable principles of law; when the trial judge invited suggestions from counsel at the close of the charge, petitioner's counsel informed the court that he had only one point that he wanted to call to the court's attention, and that related to another matter (R. 43-44).

Particularly in the light of the above-quoted instruction, it is difficult to understand in what manner petitioner was prejudiced by the fact that the allegations of the first nine counts were before the jury. Assuming, as we must, that the jury understood and applied the court's instructions, it is plain that the jury treated the allegations of each count of the indictment only as a pleading, and that

the jurors looked to the evidence, not the pleadings, in performing their function.

Even apart from the fact that mere allegations in a pleading could not have prejudiced petitioner, his contention is without merit for another reason. As we shall show below, the evidence in support of the first nine counts was admissible in support of the last two counts. And if the evidence was properly before the jury, it necessarily follows that petitioner could not possibly have been prejudiced by the fact that the allegations which the evidence supported were also before the jury.

As an appendage to the contention under consideration, petitioner suggests that the trial judge should have instructed the jury that the allegations of counts III(e) and (h) and IV(e) and (h) had been abandoned by the Government (Br. 48-49).[20] The argument apparently is an after-thought made for the first time in this Court. Assuming that such an instruction would have been appropriate, petitioner did not object in the trial court to the omission of such an instruction to the jury and reference to his briefs in the court below discloses that the point was not made in that court. In these circum-

[20] The pertinent allegations are the same in both counts. Paragraph (e) alleged that petitioner contributed services to the Communist Party by counselling members and recruits of the Communist Party in the methods and means of infiltrating various groups for the purpose of creating Communist Front organizations (R. 6). Paragraph (h) alleged that he counselled Party members to sow resentment and discontent among Negroes by agitating the question of racial discrimination (R. 7).

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stances, it is plain that the contention is not open in this Court. See Rule 30, F. R. Crim. P.; compare *Ballard* v. *United States*, 329 U. S. 187, 190, 197-199. Indeed, in view of the action of the court below in setting aside the conviction on the first nine counts, petitioner, in any event, would have no standing in this Court to raise an issue concerning the sufficiency of the instructions to the jury on one of those counts. And even if this Court accepts our position in Point I of the Argument and sustains the validity of the first nine counts, the question is not open, for the judgment is supported by any one of the other counts. *Pinkerton* v. *United States*, 328 U. S. 640, 641-642; *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.

B. *The fact that relevant evidence may possibly have disclosed other crimes is no basis for excluding it.* For his second ground petitioner urges that the court improperly admitted evidence to the effect that petitioner had called for revolution "now" and had counselled others to "infiltrate the armed forces, disintegrate their morale, take over the Army and overthrow the capitalists" (Pet. 25-26). He urges (Br. 52-53) that it was not shown at the trial that the Communist Party advocated any of these acts and thus that the evidence was not relevant on the question of his membership in the Communist Party. The short answer to the argument is supplied by the record, which discloses that each of the statements was made by petitioner in

the performance of his functions as an official of the Communist Party, and it was from the performance of these duties that the jury was entitled to infer membership in the Communist Party.

Thus, reference to pages 74-78 of the record (see Br. 58) shows that petitioner attended a meeting in New York of the National Negro Congress as a representative of the Communist Party. He addressed the group concerning the problems of the Negro people and assured the audience "that their struggles were struggles that the Communists were concerned with" (R. 75-76). At another meeting between representatives of the Negro Congress and local executives of the Communist Party, petitioner was present as a representative of the Communist Party (R. 76-78).

Pages 106-107 of the record, also referred to by petitioner (Br. 58), disclose that on November 20, 1940, petitioner met Detective Drew, who was engaged in burning old records of the Communist Party,[21] and in the course of their conversation petitioner commended him for his efforts in organizing the National Negro Congress with the aid of "several Negroes that had been Communist Party members" (R. 106). Similarly, reference to pages 112-113 of the record (see Br. 58) shows that petitioner introduced Detective Drew to the new section organizer of the Communist Party and as-

[21] Drew had infiltrated into the Communist Party in the performance of his duties as a member of the New York City Police force (see *supra*, pp. 9-10).

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sured Drew that "the Communist Party would be back of us [the National Negro Congress] and would give us all their assistance" (R. 112). Pages 115-117 of the record (See Br. 58) refer to three different meetings in which petitioner participated as an official of the Communist Party. At one meeting of the Communist Party members in the National Negro Congress, petitioner announced that one Harper, a Party member, would conduct a class for the Communist Party and that "he wanted all the colored comrades to attend this class" and that education "along the party line" would help the National Negro Congress (R. 115-116). At a second similar meeting petitioner gave "a political discussion" and (R. 116):

> spoke about how many Communists were in this country at this time, and he said that we outnumbered the number of Communists in Russia during 1917 when the revolution took place. He said that now was the time for revolution; that the Communists could have a revolution in this country.

The third meeting was between leading members of the National Negro Congress and officials of the Communist Party, including petitioner (R. 116-117). The subject of the meeting was the rebuilding of the National Negro Congress "without the visible aid of the Communist Party" (R. 117).

Petitioner's reference to page 104 of the record (See Br. 51-52) concerns a regular branch meeting

of the Communist Party on October 14, 1940. At this meeting, held shortly after the enactment of the Selective Training and Service Act, petitioner stated in addressing the group (R. 104)—

> * * * now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights, and teaching them Communism. In this way we could soon overthrow the capitalists and also take over control of the Army. * * *

The court below held—correctly, we believe—that this evidence was relevant to show the falsity of petitioner's statement that he had never been a member of the Communist Party (count 10) (R. 276). It does not aid petitioner to urge that there is no issue of purpose or intent in this case and, therefore, that the evidence was not admissible on this ground (Br. 54). For, while we disagree with petitioner's premise, that is not the basis for its admissibility. It is admissible to show that in 1940 and 1941 petitioner engaged in activities of the Communist Party and represented it as one of its officials. If the jury believed the evidence, and they did, it demonstrated quite convincingly that petitioner's denial that he ever had been a member of the Communist Party was an outright lie.

It is no answer to suggest, as petitioner does, that there "is no evidence whatsoever in this record as

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to the official advocacy by the Communist Party of revolution 'now' the infiltration of the Army to overthrow the capitalists or the sowing of resentment and discontent among Negroes" (Br. 14; see also Br. 52-53). The evidence in question shows that each of the statements was made either at a Communist Party meeting, or at a meeting of officials of the Party and the National Negro Congress, or at a meeting which petitioner attended as a representative of the Communist Party. Petitioner's statements were probative on the issue of his membership in the Communist Party because they were made by him while acting as an official of the Communist Party. The issue was not whether the Communist Party advocated revolution now or the sowing of discontent among Negroes; it was whether petitioner had willfully perpetrated a fraud on the Government by denying that he had been a member of the Communist Party.[22] And the evidence in question is plainly related to that issue.

Petitioner also urges that evidence of his statements such as the call for revolution "now" was evidence of other criminal offenses (Br. 12-13, 53-54) which substantially prejudiced him. But if, as we submit, the evidence was relevant to the issue of petitioner's membership in the Communist Party, its admissibility is in no way affected by the fact

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[22] Thus, the trial judge instructed the jury (R. 42) that the Communist Party was not on trial, and that their sole concern was whether petitioner had violated Section 35A in the manner charged in the indictment.

that it might also disclose other offenses.[23] As this Court said in *Moore* v. *United States,* 150 U. S. 57, 61, the fact that testimony also has a tendency to show the commission of another crime is not sufficient to exclude it if it is otherwise competent. See also, *United States* v. *Krulewitch,* 145 F. 2d 76, 80 (C.C.A. 2); *Bracey* v. *United States,* 142 F. 2d 85, 88 (App. D. C.), certiorari denied, 322 U. S. 762; *Troutman* v. *United States,* 100 F. 2d 628, 633 (C.C.A. 10); *Astwood* v. *United States,* 1 F. 2d 639, 642 (C.C.A. 8); *Schwartz* v. *United States,* 160 F. 2d 718, 720-721 (C.C.A. 9); 1 Wigmore, *Evidence* (3rd ed. 1940), §§215-218.

C. *Evidence of the making of the statements involved in the first nine counts was admissible to explain the circumstances of the making of the statements involved in counts 10 and 11 and to show that petitioner acted willfully in making the latter false and fraudulent statements.*—On the theory on which the case was tried, there necessarily was evidence showing the making of the statement involved in each count. By petitioner's characterization (Br. 61), some of the statements involved in the first nine counts were the same, others were similar, and others were different from

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[23] If petitioner's view were sound, he would be able to exclude the evidence from this case on the ground that it discloses other offenses and then keep it out of prosecutions for the other offenses on the ground that it would show that he committed the offenses involved in this case.

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the statements involved in counts 10 and 11.[24] Inasmuch as the court below held that the plea in bar should have been sustained as to the first nine counts, petitioner now urges that it was prejudicial error to admit evidence of the making of the first nine statements. The court below agreed that it was error, but held that the error was harmless, because evidence of the statements disclosed that petitioner had consistently and steadfastly denied any association with the Communist Party and had always maintained the position which he asserted at the trial (R. 276-277). In this sense, said the court, the admission of the evidence was beneficial rather than hurtful to petitioner.

In our view, there is no occasion to concede that the evidence was erroneously admitted. We believe that evidence of the making of the statements was admissible to show the scheme or plan pursuant to which the statements involved in counts 10 and 11 were made, and to show that those statements

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[24] Count 10 involved petitioner's statement denying that he ever had been a member of the Communist Party. The same statement, made at different times, is involved in counts 1 and 6. Count 11 involved the statement that petitioner had never used the name "Tony Whales," and the same statement, made at other times, is the subject of counts 5 and 8. Count 2 alleged that petitioner falsely stated that he had never attended any meetings of the Communist Party; count 3, that he had never contributed his services to the Communist Party; count 4, that he had never participated in any of the activities of the Communist Party; counts 7 and 9 that he never made any speeches against conscription.

were willfully false and fraudulent.[25] It is evident from the evidence summarized in the Statement that all of the false statements stemmed from petitioner's preconceived plan to obtain a position in agencies and departments of the Government without disclosing the fact that he had been a member of the Communist Party. Consistently with that plan, petitioner obtained employment subject to a character investigation, and he retained that employment by categorically denying, whenever inquiry was made, that he ever had been a member of the Communist Party or that he ever had used the name "Tony Whales." The circumstances of the making of the statements involved in the first nine counts were necessary background evidence in order that the statements made in counts 10 and 11 might be understood in their proper context.

Similarly, evidence showing the making of the same and similar statements in earlier inquiries was strong evidence in support of the Government's theory that the false and fraudulent statements involved in Counts 10 and 11 were made willfully and not as the result of misunderstanding or inadvertence. Petitioner's suggestion that the evidence could not be material to the issue of intent because Section 35A requires no specific intent is answered, we believe, by the express requirement in the statute that only false and fraudulent state-

[25] If in fact the evidence was admissible, it does not matter that the trial judge may have had a different reason for admitting it.

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ments which are willfully made are punishable, and by the theory on which the case was submitted to the jury, a theory in which petitioner concurred in the trial court. Thus, the trial judge instructed the jury (R. 43):

> It is incumbent upon the Government, as I have heretofore said to you, to prove all the essential elements of the crime charged. Briefly, these elements are:
>
> 1. That the defendant made the statements charged.
>
> 2. That the statements were false.
>
> 3. That the false statements were made willfully, knowingly, and fraudulently.
>
> If you believe that the prosecution has proved all of these elements, beyond a reasonable doubt, then you must find the defendant "Guilty."
>
> If, on the other hand, you believe the Government has not proved any one or more of these elements, beyond a reasonable doubt, you must find the defendant "Not Guilty."
>
> This is true as to each and every count of the indictment.

And in defining the necessary criminal intent required by Section 35A, the trial judge told the jury (R. 41):

> * * * We must give the term "fraudulent" the meaning the law gives to it, to wit, *a deliberately-planned purpose and intent to deceive and thereby gain an unlawful advantage.* As you know, one cannot see into the mind of

> another human being to ascertain his intentions—they can only be gathered from his words and deeds. Intent is an illusive or abstract thing capable of being understood, as I have said, only as a result of observing one's actions or hearing one's utterances. "Intent" as applicable to this case must be found from the evidence here presented, in the light of all of the circumstances under which the act or acts occurred or statements were made. [Italics added.]

It was this theory on which the case was tried in the district court, and having agreed to it in that court, petitioner, of course, may not now urge a different theory eliminating the element of intent as one of the ingredients of the offense. *Johnson* v. *United States,* 318 U. S. 189, 200-201.

Tested in the light of the requirement that the Government was obliged to prove as to counts 10 and 11 that petitioner had "a deliberately-planned purpose and intent to deceive and thereby gain an unlawful advantage," it is evident that testimony concerning the making of the first nine statements was extremely important to show that the statements involved in counts 10 and 11 were made with the requisite illegal intent. It might have been possible for petitioner to explain away the statements involved in counts 10 and 11 as having been made in an informal context and without petitioner's intending to deceive the State Department to obtain an unlawful advantage. But evidence show-

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ing that the statements in question were made by petitioner as a further step in his plan to deceive the Government, and that related statements previously had similarly been made, removed the basis for any claim of innocent purpose and demonstrated petitioner's purpose to deceive the Government in its full nakedness.

There is no area for disagreement among the parties over the settled principle that such evidence is admissible for the purpose we have shown, notwithstanding that proof of the making of the nine statements also was proof, in part, of the commission of nine legally separate, but related, offenses. The rule often has been recognized by this Court. *Glasser* v. *United States,* 315 U.S. 60, 80, 81-82; *Lisenba* v. *California,* 314 U.S. 219, 227; *Moore* v. *United States,* 150 U.S. 57, 61; *Williamson* v. *United States,* 207 U.S. 425, 450-451; *Allis* v. *United States,* 155 U.S. 117, 119; *Wood* v. *United States,* 16 Pet. 342, 360. And it regularly has been recognized in the lower federal courts. See, e.g., *Bracey* v. *United States,* 142 F. 2d 85, 87-88 (App. D.C.), certiorari denied, 322 U.S. 762; *Borum* v. *United States,* 56 F. 2d 301, 302-303 (App. D.C.); *Hatem* v. *United States,* 42 F. 2d 40, 41 (C.C.A. 4); *Morris* v. *United States,* 112 F. 2d 522, 527-528 (C.C.A. 5); *Kettenbach* v. *United States,* 202 Fed. 377, 383-384 (C.C.A. 9), certiorari denied, 229 U.S. 613; *Bacon* v. *United States,* 97 Fed. 35, 41-42 (C.C.A. 8); 1 Wigmore, *Evidence* (3rd ed. 1940), §§ 215-218; 2 *id.,* §§ 304-307, 321-324.

It is true that if the evidence in question had been admitted on the theory which we urge, petitioner would have been entitled to request that the jury be instructed to consider the evidence only on the issue of petitioner's purpose and intent. But the absence of such an instruction here could not have substantially prejudiced petitioner, for the evidence had no bearing and cast no light on any other issue in the case. Thus, for example, evidence that petitioner had denied membership in the Communist Party, that he had denied using the name "Tony Whales," or that he had denied performing services for the Communist Party gave the jury no information concerning the truth of the denials or concerning the undisputed fact that petitioner did make the statements involved in counts 10 and 11. Its sole significance related to the intent question, concerning which the jury had full instructions (see *supra*, pp. 55-56). In these circumstances, where the evidence in question gave information to the jury which, from its nature, could only aid the jury on the intent issue, the suggested instruction would have given petitioner no additional protection. We submit that petitioner could not have been prejudiced by the absence of a formal instruction requiring the jury to limit consideration of the evidence to that issue. See *Kotteakos* v. *United States*, 328 U.S. 750.

D. *The validity of any count is sufficient to support the general sentence.* The maximum punish-

ment prescribed for violation of Section 35A was a term of imprisonment for 10 years, a fine of $10,000, or both (*supra*, pp. 3-4).[26] The jury specifically found petitioner guilty on all 11 counts (R. 45-46), and the trial judge imposed a general sentence of imprisonment for a term of from one to three years (R. 47), a term well within the maximum permissible for any one count. Petitioner now urges that the sentence is invalid, inasmuch as the conviction on nine of the eleven counts was reversed by the court below. In making the argument, he recognizes the long-established rule of *Claassen* v. *United States*, 142 U. S. 140, 146-147, that—

> * * * it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only.

But he urges that the presumption is rebutted in this case on the theory that the trial court thought that each of the eleven counts charged a separate offense and therefore "must necessarily

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[26] The new Criminal Code has reduced the maximum term of imprisonment to five years. See 18 U.S.C. 1001.

have imposed its general sentence on the basis of eleven separate convictions" (Br. 74).

The difficulty with petitioner's argument is that the situation here is no different from that in the *Claassen* case. There, the trial judge imposed a general sentence after the jury had convicted the defendant on five counts, and this Court declined to review contentions relating to four of the counts because the Court determined that one count was unassailable.[27] If, as the Court held, the presumption that the sentence was imposed on the valid count was not rebutted there, it equally has not been rebutted here.

There is no need to labor the point, for the precise situation presented by this case was recently before this Court in *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, and the *Claassen* rule

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[27] Petitioner misplaces his reliance on the statement in the *Claassen* opinion that the situation is different where there is a general verdict and the jury has been erroneously instructed as to one count. A different rule applies there because it is not possible to know from the general verdict whether the jury convicted on any count other than the count concerning which an erroneous instruction was given. For illustrations of the application of the rule in a slightly different context, see *Cramer* v. *United States*, 325 U.S. 1, 36, n. 45; *Haupt* v. *United States*, 330 U. S. 631, 641, n. 1. Here, however, as in the *Claasen* case (142 U.S. at 147), the verdict was not general and hence, the rule could have no application. So long as there is one count which is unassailable, the sentence is not open to attack.

The reported opinion in *Dwyer* v. *United States*, 170 Fed. 160, 166 (C.C.A. 9), relied upon by petitioner, does not disclose whether the jury's verdict was general. If it was, the decision is consistent with the decisions of this Court. If the verdict was not general, then the decision is obviously erroneous.

was held to be applicable. The Pinkertons were convicted on several substantive counts and were given general sentences, which did not exceed the maximum sentence allowable under any one count (328 U.S. at 641-642). The situation is the same here. In the trial court the Pinkertons demurred to various of the charges against them on the ground that they were barred by the statute of limitations (No. 719, Oct. T. 1945, R. 13-15). The demurrer was overruled (*ibid.*, R. 25-26), but on appeal, the circuit court of appeals held that the demurrer should have been sustained as to certain counts because they were barred by the statute of limitations. Since, however, each of the remaining substantive counts supported the general sentence, the judgment was affirmed. See *Pinkerton* v. *United States*, 151 F. 2d 499, 500-501 (C.C.A. 5). In this Court, the Pinkertons raised the question whether the reversal of their conviction on some of the counts invalidated their general sentence (Pet. 2, No. 719, Oct. T. 1945). This Court considered the problem and held that the "settled law" of the *Claassen* case controlled (328 U.S. at 642).

The present case is not distinguishable from the *Pinkerton* case. Here, as there, a challenge to the validity of some of the counts of the indictment on the ground that they were barred by the statute of limitations was rejected by the trial court. Here, as there, the trial court was reversed by the Court of Appeals. In both cases the appellate

court applied the rule of the *Claassen* case and affirmed the sentence, notwithstanding the reversal as to some counts. This Court agreed with that disposition in the *Pinkerton* case. We submit that the same result must be reached here.[28]

Significantly, if petitioner believes, as he argues (Br. 75), that the same sentence would not have been imposed if only the last two counts had been in the case, he has a remedy available in the trial court. If the judgment is affirmed by this Court, he may within 60 days apply to the trial court for a reduction in sentence, as is permitted by Rule 35 of the Federal Rules of Criminal Procedure. By adhering to this procedure, petitioner will afford the trial judge an opportunity to make plain whether the sentence is more severe than it would have been if the first nine counts had not been in the case.

## III

**Petitioner had ample basis for knowing that the willfully false and fraudulent statements involved in counts 10 and 11 were within the proscription of Section 35A of the Criminal Code.**

As we have shown in the Statement, *supra,* pp. 7-8, in the spring of 1946, Mr. Panuch, the then Deputy Assistant Secretary of State for Administration, requested through a subordinate that petitioner voluntarily submit his resignation from the

[28] See *Hirabayashi* v. *United States,* 320 U.S. 81, 85, 105, involving the same result in dealing with concurrent sentences, rather than a general sentence.

Department, for security reasons (R. 47-49). Petitioner met the request with the statement that he would take the matter up with the Office of the Assistant Secretary of State for Administration, and he then requested a conference with Mr. Panuch of that office, for the purpose of discussing the request for his resignation (R. 47-48). The conference was held on June 1, 1946, in Mr. Panuch's office and was opened by a statement to petitioner of the "substantial" security reasons underlying the request for his resignation. Mr. Panuch testified that he stated that the charges were as follows: (R. 49):

> * * * that you were a Communist, a member of the Communist Party in 1940 and 1941, and that you were a Communist organizer; that you operated in front organizations in New York. * * * That you operated under the alias of Tony Whales; that your wife was a member of the Communist Party and that her Communist Party name was Edith Charles; that you opposed conscription; that you made a false statement with respect to your financial resources to get a job with W.P.A., and that statement was made under oath; and that you signed a petition as a member of the Communist Party for the * * * election of Earl Browder as Congressman.

Petitioner denied that he ever had been a member of the Communist Party (count 10) or that he ever had been known as "Tony Whales" (count

11), and he either denied or explained away the other "charges" (R. 50). And to support his denials, he directed Mr. Panuch's attention to the prior proceedings before the Civil Service Commission (R. 51) (see *supra*, pp. 6-7). The conference lasted over two hours and involved a complete consideration of the problem under discussion. In explaining the nature of the proceeding, Mr. Panuch testified that "it was in the nature of an appeal" from the request for petitioner's resignation (R. 52). Following this conference, Mr. Panuch informed petitioner that he could remain with the Department (R. 59).

Petitioner now contends that to hold him criminally responsible for false and fraudulent statements which he willfully made at the proceeding before Mr. Panuch is to deny him his rights under the Fifth and Sixth Amendments to the Constitution. As we understand his argument, it is that as applied to this case, Section 35A is unconstitutionally vague and indefinite because it was not possible for him to know that his willfully false and fraudulent statements were made, as the statute provides, "in any matter within the jurisdiction of any department or agency of the United States." And in support of the contention he argues that the statements were made in a voluntary conference; that he was not under oath; that they were not stenographically transcribed; and that they were not made pursuant to any law or regulation.

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As a preliminary to considering this contention, it is important to note that there is no dispute among the parties that the statements involved in counts 10 and 11 were made under the circumstances alleged in the indictment. Nor is there any question in this Court that the jury was justified in finding that they were willfully false and fraudulent. Petitioner's only point is that he was unable to know from Section 35A that such willful falsification was subject to criminal penalties.

The language and legislative history of the pertinent clause of Section 35A was fully considered by this Court in *United States* v. *Gilliland*, 312 U.S. 86. And so, like petitioner, we start with the opinion in that case. There, the Court concluded (312 U.S. at 93)—

> The statute was made to embrace false and fraudulent statements or representations where these were knowingly and willfully used in documents or affidavits "in any matter within the jurisdiction of any department or agency of the United States." In this, there was no restriction to cases involving pecuniary or property loss to the government. The amendment indicated the congressional intent to protect *the authorized functions of governmental departments and agencies* from the perversion which might result from the deceptive practices described. [Italics added.]

Thus, the Court read the statutory language "in any matter within the jurisdiction" of a depart-

ment as meaning in any matter involving the "authorized functions" of the department in question. And this, in substance, is the meaning which the lower federal courts have given the quoted language.[29]

No one, we believe, could have any difficulty in understanding from the face of the statute that the crucial words "in any matter within the jurisdiction" of a department comprehend those matters which are within the authorized functions of the department. For that is the natural import of the words in their setting. Compare *United States* v. *Birdsall*, 233 U.S. 223, 230-231. Whatever uncertainty there may be in the application of the statute stems from the fact that conceivably there are some situations in which one could not know with certainty whether a given matter is within the authorized functions of a given department or agency.[30] These are the borderline situations which invariably arise in the application of criminal statutes. But whatever possible uncertainties

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[29] See *United States* v. *Mellon*, 96 F. 2d 462, 463 (C.C.A. 2), certiorari denied, 304 U.S. 586; *United States* v. *Zavala*, 139 F. 2d 830, 831-832 (C.C.A. 2); *Spivey* v. *United States*, 109 F. 2d 181, 184-185 (C.C.A. 5), certiorari denied, 310 U.S. 631; *United States* v. *White*, 69 F. Supp. 562, 564 (S.D. Calif.); *United States* v. *Sanders*, 42 F. Supp. 436, 439 (S.D. Tex.); see also *United States* v. *Heine*, 149 F. 2d 485, 487 (C.C.A. 2), certiorari denied, 325 U.S. 885; *United States* v. *Schneider*, 45 F. Supp. 848, 851 (E. D. Wis.).

[30] Cf., e.g., *Terry* v. *United States*, 131 F. 2d 40, 43-44 (C.C.A. 8), with *United States* v. *Mellon*, 96 F. 2d 462, 463 (C.C.A. 2), certiorari denied, 304 U.S. 586; and *United States* v. *Crittenden*, 24 F. Supp. 84, 88 (W.D. N.Y.), with *United States* v. *Sanders*, 42 F. Supp. 436, 439-440 (S.D. Tex.).

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there are in such cases need not trouble us here, for this is not a borderline case. See *United States* v. *Petrillo*, 332 U.S. 1, 5-8; *Robinson* v. *United States*, 324 U.S. 282, 285-286.

The words of the statute told petitioner that if he willfully gave false information to the State Department in a matter concerning which it had power to act, he would be subject to criminal prosecution. As an employee of the State Department, petitioner could not avoid knowing that his employment status was a matter on which the Department had authority to take action. He was chargeable with knowledge that he could be removed for cause,[31] or transferred to another position if the Secretary of State determined that such a transfer was necessary.[32] A mind intent on knowing could not have failed to realize that the less drastic step of accepting a requested resignation of an employee likewise is an authorized function of the Department. That petitioner did realize this is demonstrated by the very fact that he sought action from the Office of the Assistant Secretary of State for Administration and obtained it, favorably to himself. It is impossible, we submit, to reconcile petitioner's request for the conference with his present contention that he could not know that his conference with Mr. Panuch was on a mat-

[31] Act of August 24, 1912, 32 Stat. 555, Section 6 (5 U.S.C. 652). See also Rule XII, Rules of the Civil Service Commission, 5 C.F.R. 449-452.

[32] Act of June 20, 1874, 18 Stat. 90, Section 1, as amended (5 U.S.C. 154).

ter within the jurisdiction of the State Department.

Petitioner suggests that, unlike the situation in the *Gilliland* case, *supra*, 312 U.S. at 91, there were no regulations here which informed him of the information required of him and of the penalty for furnishing willfully false and fraudulent information. The short answer is that no information was required of petitioner and hence there obviously would be no applicable regulations. The Department of State did not seek information from petitioner. He volunteered it as part of a successful effort to persuade the Department to withdraw its official request that he resign his position in the Department. Having submitted information to the Department for the purpose of influencing its official action in a matter within the Department's jurisdiction, petitioner can hardly now be heard to urge that he did not know that the information was pertinent. His recognition of its pertinence is demonstrated by the fact that he submitted it on his own volition. The statute plainly told petitioner that criminal consequences attached to his willful submission of false and fraudulent information to the State Department. A regulation could have told him no more. Compare *United States* v. *Birdsall*, 233 U. S. 223, 230-231. Willful falsification in the State Department matter and in the prior proceedings is wholly inconsistent

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with petitioner's present suggestion of surprised innocence.

Petitioner also seeks to buttress his indefiniteness argument by the fact that the statements were not made under oath nor in a formal proceeding in which the statements were stenographically transcribed. But nothing in the Constitution so limits criminal responsibility. The argument that an oath should be administered as a condition to liability for false statements is not new. It was advanced by the petitioner in *Kay* v. *United States,* 303 U. S. 1,[33] and rejected by the Court without comment, the Court holding that Section 8(a) of the Home Owners' Loan Act, which closely resembles the pertinent clause of Section 35A, was not unconstitutionally vague and indefinite. Section 35A does not require an oath as an ingredient of the offense (*United States* v. *Dumas,* 288 Fed. 247 (E. D. N. Y.)), and since the statute punishes only willfully fraudulent statements there is no danger that an innocent mind would be misled by the absence of an oath.

Similarly, the fact that the statements, which petitioner admitted making (R. 177-179), were not stenographically transcribed when they were made presents no serious problem. Until the recent enactment of the Court Reporter Act (Sec. 5a of the Judicial Code, 28 U.S.C. [1946 ed.] 9a, now 28

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[33] See Brief for Petitioner, pp. 28-29, and Brief for the United States, pp. 31-32, 48, No. 61, Oct. T. 1937.

U.S.C. 753), many federal court proceedings, even in criminal cases, were not stenographically transcribed. See *Miller* v. *United States*, 317 U. S. 192, 197-199. Reducing important statements to writing when they are made is a convenient method for later establishing what was said, but nothing in the Constitution makes that the exclusive mode of procedure or proof.

It is idle to urge, as petitioner does (Br. 29-30), that the interview was not in conformity with regulations providing for the hearing of charges against employees. Petitioner previously had had such hearings before the Civil Service Commission (see, *supra*, pp. 6-7). When he was requested to resign, he neither wanted nor sought another hearing. Instead, he desired a conference with the executive of the Department responsible for the request. Having obtained precisely what he sought, he is hardly now in a position to complain that the procedure which he selected should not have been pursued. But, in any event, he may not excuse the willful making of false and fraudulent statements by attacking the validity of the proceeding in which they were made. In the words of this Court, "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction."

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*Kay* v. *United States,* 303 U. S. 1, 6-7, and cases cited; see also *United States* v. *Meyer,* 140 F. 2d 652, 655 (C.C.A. 2).

Petitioner's effort to characterize his conference with Mr. Panuch in terms of a friendly, casual conference between two employees of the Government who were not on notice of the significance of what was being said finds no support in the testimony of Mr. Panuch, which must be accepted at this stage of the litigation. *Glasser* v. *United States,* 315 U. S. 60, 80. It will be recalled that petitioner knew, long before he made the statements in question, that there was a serious question concerning his suitability for employment because of evidence that he had been a member of the Communist Party while using the name Tony Whales. It is evident that when petitioner was requested to terminate his position with the State Department he knew the reasons for the request. He did not seek any formal hearing in an effort to have the request withdrawn. Instead he went to the Deputy Assistant Secretary for Administration, Mr. Panuch, who had determined that petitioner was not suitable for employment in the State Department, and sought to persuade that official that the charges against him were untrue. It is evident from the testimony concerning the conference that it was not a casual one in which no one realized that the stakes were high. Mr. Panuch testified that at the opening of the discussion he informed petitioner

that he had authorized the request that petitioner resign, and that there were "substantial" security reasons for the request (R. 48-49). Then Mr. Panuch detailed the charges against petitioner and petitioner, in turn, specifically denied each one (R. 49-50), stating, *inter alia,* that "I am not and never was a member of the Communist Party" and that "I was never known as Tony Whales" (R. 50). Petitioner referred Mr. Panuch to the findings in the earlier Civil Service investigation; to his religious background as evidence that he was not a Communist; and he sought to persuade him that the charges resulted from the fact that the personnel of the Security Office of the State Department "were a bunch of country boys who didn't know the difference between a Communist, a liberal, an anarchist, and a Socialist" (R. 51-52).

That Mr. Panuch regarded the matter seriously, and not as mere casual inter-office conversation, is shown by his testimony that the conference lasted over two hours and "was in the nature of an appeal." In Mr. Panuch's words, "the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly" (R. 52).

The short of the matter is that petitioner sought an interview with Mr. Panuch, with whom he testified he had "a good personal relationship" (R. 176), for the purpose of persuading that officer that

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he was not a security risk. That his denials were persuasive is demonstrated by the fact that the request for petitioner's resignation was withdrawn until several months later, at which time the extremely damaging information that Detective Drew had obtained first became known to the State Department. Thus, false statements which enabled petitioner to retain his position in the State Department are the basis for his conviction. They were made for the purpose of influencing the decision on an official matter in the Department of State. In no sense were they innocent misstatements of fact attributable to a pure motive.

## IV

**The contention that the trial judge excluded competent evidence solely because it involved "Negroes and Negro organizations" and the jury had among its members nine Negroes is utterly without support in the record.**

Petitioner's final contention is that "the trial court excluded relevant, competent, material and important evidence, involving Negroes and Negro organizations, solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same terms as any other representative jury" (Pet. 33-34; see Br. 77). Accordingly, he argues that he was denied a fair trial before a representative jury (Br. 107). In support of this contention, petitioner refers to three incidents in the course of the trial as showing that

the court used the inappropriate rule of exclusion which he ascribes to it.

The same contention was urged in the court below and was extensively considered and rejected, both because the reason for the trial court's rulings was not that which petitioner suggests and because there was no improper exclusion of evidence tendered by petitioner. We agree with the court below on this issue, but in view of the nature of the contention we deem it appropriate to set forth in detail the three incidents upon which petitioner relies, in order that the total lack of basis in the record for petitioner's contention may be made plain.

A. *The police brutality incident.*—In the course of the presentation of the Government's case, one Harper testified that he had met petitioner in the fall of 1940 (R. 72); that in May 1941 he attended a meeting at petitioner's home (R. 76); that the meeting was attended by representatives of the National Negro Congress and executives of the Communist Party in the New York area (R. 76); that the meeting was concerned with difficulties experienced by the Congress because of Communist participation in the organization (R. 76-77); that petitioner attended the meeting as a representative of the Communist Party (R. 78); and that petitioner actively participated in the meeting (R. 77).

In the course of petitioner's testimony, he stated

that Government witness Harper "was a good friend of mine" (R. 185), and that he met him in 1940 at his home through his wife (R. 185). Then the following occurred (R. 186):

By Mr. Ford [petitioner's counsel]:

Q. How do you happen to recall that Harper was at your house on this occasion?

A. * * * The specific thing that recalled it to me was that there had been an accident—incident—at that time around the East Side of which there must be a record in the police files, concerning the beating up of two Negroes; two Negroes and a scout car were involved—

The Court. Just a minute, sir. We are not interested in that.

Mr. Ford. I am now establishing the fact of how he happens to recall back seven years ago of this meeting and the meeting with Harper at his house.

The Court. Yes, sir, and it could have other purposes, Mr. Ford.

Suppose you come to the bench.

Mr. Ford. All right.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice as follows:)

The Court. I do not think we are interested in an outbreak here about the Secretary of

> State and the FBI, sir.[34] We do not want that to occur again.

The colloquy continued at the bench (R. 186-187) and in the course of it petitioner's counsel sought to explain the relevance of the proposed testimony concerning the beating of two Negroes, as follows (R. 187-188):

> Mr. Ford. Well, he is going to testify that * * * when he came home, that is what they were talking about, and he advised Harper that the way to do that was that if Harper believed that, to write the Police Commissioner and submit the names, because he felt that the Commissioner would take care of anything that was wrong. And that is first how he remembers meeting the witness Harper, who is a witness against him, and secondly, those were the circumstances, and that was not a Communist Party meeting. * * *

There was further discussion and then interrogation of petitioner resumed, as follows (R. 189-190):

> Q. Now, at that time that time that Harper was at your house, were there other people present?
>
> A. Yes, sir.
>
> Q. And was there a discussion going on at

[34] The court's reference was to an incident which had occurred a few moments earlier in which petitioner had suggested from the witness stand that certain officials of the State Department and the Director of the Federal Bureau of Investigation "leaked" information to newspaper columnists. Petitioner's counsel conceded at the trial that such comments were unnecessary to the case. (R. 177.)

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the time when you arrived at your house from N.Y.U.?

A. Yes, there was.

Q. And—

*Mr. Ford. Your Honor, I do not see how I can ask it except to bring out the discussion.*

*The Court. All right, sir.* [Italics supplied.]

By Mr. Ford:

Q. And after that discussion regarding certain incidents that happened in the neighborhood, was it?

A. That is correct.

Q. And you talked it over with Mr. Harper and the others?

A. That is right. I said that I was sure—

Q. What did you say to do about it? Do not say what he was writing about, but say what you told him to do about it.

A. I told him I was sure the Police Commissioner would not like what had taken place; would not condone such actions, and I suggested that a letter be drawn up by whoever was there as witnesses, and the neighborhood people, to draw up such a letter and send it.

Q. Now, at that time, was that a meeting of the Communist Party, or was there anything mentioned on that occasion when Harper was at your house about communism?

A. No, sir.

In our view, the above excerpts from the record show beyond question that the evidence which pe-

titioner sought to adduce in this instance was admitted. Compare petitioner's counsel's statement of what petitioner would testify to with his testimony last quoted (*supra*, pp. 76-77). It is true that the details of the incident in which the two persons were beaten were not developed, but we perceive no relevance in such facts, and we do not understand petitioner to contend otherwise. The whole purpose of the testimony, according to petitioner's counsel, was to show how petitioner recalled the incident of seven years before and to show that the subject of the meeting in petitioner's home was not Communism. This was shown by petitioner's reference to the beating and his advice to the persons at the meeting on how to deal with the situation and by the testimony that nothing was mentioned about Communism. The details of the beating, of course, would have cast no light on either of these matters.

Petitioner's argument that the trial judge's rulings in this regard were based on extra-legal considerations is belied by the judge's explanation of the reasons for his rulings. Thus, when petitioner's counsel was summoned to the bench, the trial judge told him that he was anxious that petitioner should not use the witness stand for prejudicial outbursts (R. 186-187, 188). It was this desire to avoid uncalled for and prejudicial outbursts from petitioner which underlay the trial judge's painstaking effort to limit the testimony to rele-

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vant evidence. And, significantly, when petitioner's counsel persisted in his claim that it was necessary for him to ask petitioner concerning the subject matter of the meeting at his home, the trial judge, recognizing the claim of relevance, said, "All right, sir" (R. 190).

Instead of being criticized for his action, the trial judge, more appropriately, is entitled to commendation for his conscientious effort to confine the evidence on both sides to the issues in the case.

B. *Cross-examination of Detective Drew.*—The short answer to petitioner's argument that the trial judge improperly limited his cross-examination concerning Detective Drew's participation in activities of the National Negro Congress is that the court expressly authorized petitioner to cross-examine Drew as to any matter brought out in the direct examination. Thus, when the trial judge told petitioner's counsel that the cross-examination was going beyond the issues in the case, the following colloquy occurred (R. 125):

> Mr. Ford. May I have an exception on this limitation for cross-examination?
>
> The Court. Yes. I understand from the pleadings that the issue in this case is whether or not certain statements were made knowingly and willfully and falsely.
>
> Mr. Ford. What I have to say, your Honor, I will assume that is correct, and had the Government had that realization and limited their testimony to that realization, I would not have

attempted any of this cross-examination, but what I am trying to cross-examine him about is all of the things the Government put into this case and discussed in this case, by witnesses in front of the jury, and it is only because of the fact that I think he went outside of it, that I should be permitted to go outside of it.

The Court. *I agree with you, and the Court will permit you to go into anything which was brought out on any of these occasions as to which there is testimony, sir.* [Italics added.]

Mr. Ford. And I also offer these questions to question his credibility, as a basis for testing his credibility.

The Court. I will not go into that. I will permit you to go into and attack his credibility as to anything that he has dealt with on those particular occasions.

I agree with you that we have gone afield, sir, and *I agree with you that you can go to the extent of meeting those situations, but only as to those.* [Italics added.]

That petitioner did cross-examine Drew with a view to showing the nature of his participation in the National Negro Congress is demonstrated by the following questions and answers on cross-examination (R. 123):

Q. Did you organize or help to organize a branch of the National Negro Congress in New York? A. I did, sir.

Q. And who, if anyone, helped you organize

that branch? A. Louis Harper, George Smith, Beatrice Smith, Harry Palmer.

Q. And what date was that that you organized that branch? A. I don't know the exact date, sir.

Q. Will you give me approximately the date? A. I think it was around September of 1940.

Q. And were you one of the original organizers? A. Of the East Side Council; yes.

Q. Of the National Colored Congress? A. Of the East Side Council; yes.

Q. Of that branch? A. Yes.

Q. Did you solicit memberships for that Congress? A. I did.

Q. And did you solicit that membership from the area around in the East Side; the lower East Side? A. I did.

Here again, the record shows that the trial judge's rulings were based solely on the relevance of the information sought by petitioner on cross-examination. That there was no abuse of discretion in limiting cross-examination is demonstrated by the trial judge's express statement to petitioner's counsel that he would be permitted to inquire into any matter which was brought out on the direct examination. Nothing to which petitioner refers suggests, in any manner, that the trial judge used any other test in ruling on the admissibility of evidence.

C. *The evidence concerning the objects of the National Negro Congress.*—Petitioner's final ar-

gument is that the trial court improperly refused to permit him to inquire on cross-examination of witnesses Harper and Drew concerning the purposes, objects and organization of the National Negro Congress (Br. 101)

The primary incident appears at pages 79 to 81 of the record, as follows:

> Q. I would like to have you [Harper] list some of the purposes of the National Negro Congress; what its objects were. A. In the founding of the National Negro Congress it was felt that there was not a militant enough organization representing the aspirations, desires, the well-being of the Negro people in the United States. Negro Congress was formed in 1932.
>
> At that time the most vocal organization of the Negro people was the National Association for the Advancement of Colored People.
>
> That was a period of great economic stress, the height of the depression. And many Negroes had come to feel that the NAACP was not militant enough as it had been in previous years, and so a call was sent out calling all organizations, Negroes, trade unions, churches, lodges, and friends of the Negro people, to come to a founding convention that was held in Chicago.
>
> Q. At that time when that call was sent out to the different organizations you have enumerated, like the churches and all, there was a response from those organizations, was there? A. That is right. They came together in Chi-

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> cago in 1936, and we had a three-day convention in the big Eighth Regiment Armory.

At this point, after witness Harper had quite fully stated his understanding of the objects of the organization, the trial judge summoned counsel to the bench and cautioned counsel that he could inquire into matters relating to "the tie-in" with the Communist Party and to a specified meeting concerning which there had been testimony on direct examination, but that "we are not going into the organization and desires and aims of this Congress" (R. 79-81).

In view of the fact that the witness, on cross-examination, had extensively stated the purposes and objects of the National Negro Congress before the trial judge interceded, we have difficulty in perceiving how petitioner was hurt by the court's statement to counsel that it was unnecessary to inquire into this subject. The testimony already was before the jury. But apart from this, petitioner makes no showing that an inquiry into the objects of the National Negro Congress could have any possible relevance to the issues on trial. The court below was unable to see the relevance of this proposed line of inquiry, and neither do we.

In sum, the basic infirmity in petitioner's contention is that the rulings of the trial court were predicated on the accepted standards governing the admissibility of evidence. Nothing in the record justifies petitioner's present argument that con-

siderations of race and color controlled or even influenced the rulings on the admissibility of evidence. Indeed, petitioner's counsel did not even suggest to the trial judge that he so interpreted the rulings. It was only when the case reached the appellate court and the quest for reversible error was in high gear that the present contention was conceived. Since that contention is not supported by anything in the record, it necessarily fails.

### CONCLUSION

We therefore respectfully submit that the judgment of the court below should be affirmed.

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